

ORIGINAL TRANSCRIPT

FILED IN THE
UNITED STATES
BANKRUPTCY COURT
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2012 SEP 17 PM 3:29

DISTRICT OF UTAH
IN THE UNITED STATES BANKRUPTCY COURT

DISTRICT OF UTAH, CENTRAL DIVISION

)
IN RE:) TRANSCRIPT OF
) PROCEEDINGS
VS FOX RIDGE, LLC)
and) Bankr. Case No.:
) 12-28001-JTM
STEPHEN LAMAR CHRISTENSEN) Bankr. Case No.:
and VICTORIA ANN) 12-28010-JTM
CHRISTENSEN,)
Debtors.) Jointly Administered
) Under Case No.:
) 12-28001-JTM
)
) (Chapter 11)
)

September 13, 2012 * 2:00 p.m.

TRANSCRIPT PRODUCED FROM ELECTRONIC RECORDING

Location: United States Bankruptcy Court
350 South Main Street, #348
Salt Lake City, Utah 84101

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Notary Public in and for the State of Utah



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PROCEEDINGS

THE COURT: Good afternoon.

Please call the calendar.

THE CLERK: This is in the matter of VS

THE COURT: Could I get appearances,

9 MR. BOLEY: Your Honor, Matthew Boley,
10 appearing on behalf of debtor, VS Fox Ridge, LLC.

11 MR. BERRY: David Berry for the
12 Christensen debtors.

13 MS. OLSEN: Sherilyn Olsen and John
14 Harrington of Holland & Hart, on behalf of Forge
15 Investments UT, LLC.

16 MR. KUHN: Peter Kuhn, for the United
17 States Trustee.

18 MR. SHIELDS: Your Honor, Jeffrey L.
19 Shields, on behalf of Ted Heap and multiple entities.

20 MR. OLSON: Your Honor, Erik Olson for
21 creditor, Traverse Mountain Enterprises, LLC.

22 THE COURT: Thank you.

23 Ms. Olsen, this is your motion.

24 MS. OLSEN: Thank you, your Honor.

25 This is the time set for the motion to

1 clarify whether or not the automatic stay prohibits
2 Forge Investments from moving forward in State Court
3 cases in the -- pending before the Fourth District
4 Court relating to non-debtor parties. There are two
5 pending actions. One is called the -- we refer to as
6 the Mountain Home litigation. One we refer to as the
7 Triumph litigation.

8 In the Mountain Home litigation, your
9 Honor, that is a judicial foreclosure, as well as a
10 breach of contract claim against the borrower and the
11 guarantors. Mr. Christensen and VS Fox Ridge are
12 parties to that action.

13 The section action is -- and then there
14 are multiple other non-debtor parties.

15 And then in the Triumph litigation, that
16 is a deficiency action where Mr. Christensen and VS
17 Fox Ridge are also defendants. And that is
18 guarantors, not as borrowers.

19 In the Mountain Home litigation they're
20 also in there as guarantors and not as owners of the
21 property or as the borrower.

22 Your Honor, we -- as Forge, we're moving
23 forward with those actions. And when the bankruptcy
24 filing came, the TM parties and the debtor filed
25 notices of application to stay. Forge took the

1 position that the stay did not apply as to the
2 non-debtor parties but the claims were now bifurcated
3 and we could proceed forward against all non-party
4 parties but no longer pursue our claims against the
5 two debtors. The State Court asked us to come back
6 to the Bankruptcy Court and clarify whether or not
7 the stay applies. And in the alternative, seek
8 relief from the stay. That is the predecessor --
9 precursor to the motion that we have pending before
10 the Court that is to be heard today.

11 One issue I wanted to address regarding
12 notice, your Honor. We noticed the motion to the 20
13 largest creditors of VS Fox Ridge and to all ECF
14 parties and to all parties who requested notice.
15 However, the motion did not go out to the 20 largest
16 on the Christensens' personal case. That was an
17 error on our office's part. However, several of the
18 parties are the same. There are a few parties who
19 did not receive it who are on the Christensens' 20
20 largest. If this Court believes the stay does not
21 apply, which is our primary position, your Honor,
22 then we do not believe that notice issue becomes an
23 issue. If the Court believes the stay applies and
24 that this is, in fact, a motion for relief from stay,
25 then we ask that the Court grant the motion for

1 relief as it relates to VS Fox Ridge and then we will
2 go ahead and schedule a hearing 17 days out on the
3 Christensens' bankruptcy case.

4 We have received only two responses. One
5 is from the debtors and one is from the TM parties.

6 In the debtors' response, your Honor, they
7 do not object and they take the affirmative position
8 that the stay does not apply to Forge Investments
9 moving forward in the State Court action against the
10 non-debtor parties.

11 As it relates to the TM parties, they take
12 no position on whether or not the stay applies, but
13 they say instead, your Honor, if -- if you're going
14 to let them go forward, you have to let us go
15 forward, too. In affect, trying to hold our motion
16 hostage until their motion for relief from stay is
17 heard.

18 They did finally file their motion for
19 relief from stay yesterday, but -- or late the night
20 before that, but a preliminary hearing only is
21 scheduled and not until October 10th. And at that
22 point in time if there are objections filed, which we
23 anticipate there will be by the debtors, then another
24 hearing sometime in the future will be held.

25 We believe there is no opposition to the

1 position that Forge is entitled to move forward
2 because the stay does not apply as to the claims
3 against the non-debtor entities in the State Court
4 cases. And we ask that the Court enter an order
5 clarifying the stay on that issue.

6 THE COURT: Is there anything material
7 happening in either of the State Court actions in the
8 next 30 days?

9 MS. OLSEN: What we have going on, your
10 Honor, is on the 21st there's a hearing before Judge
11 Taylor. There are three pending motions before the
12 Court in the State Court action. There's a motion to
13 consolidate the two State Court actions into one.
14 There is a motion to amend the pleadings by the TM --
15 TM parties to allege a counterclaim against Forge.
16 And this is important, your Honor. One of the
17 primary reasons they want to hold us hostage --

18 THE COURT: Go back and do that again.

19 MS. OLSEN: Okay. Three motions that are
20 currently pending: motion to consolidate, motion for
21 summary judgment on the --

22 THE COURT: Motion to consolidate both of
23 those actions?

24 MS. OLSEN: Both of the State Court
25 actions into one.

1 THE COURT: And whose motion is that?

2 MS. OLSEN: That is Forge's motion.

3 THE COURT: Okay.

4 MS. OLSEN: The second motion is a motion
5 for summary judgment on the deficient -- on the
6 Mountain Home case, on the foreclosure and action
7 relating to liability and ability -- and ownership of
8 the property to foreclose. That's been fully
9 briefed. And the third motion that's pending is a
10 motion by the TM parties to amend their answer to
11 include a counterclaim. It's this conspiracy theory
12 that forms the basis of everything they're asking
13 this Court to do.

14 And it's important for the Court to note
15 that the motion to amend only relates to bringing a
16 counterclaim against Forge. There's factual
17 allegations that relate to Mr. Christensen
18 personally, but not -- he is not a party to the
19 proposed counterclaim, nor does -- do they pray for
20 relief against the debtor in this motion to amend
21 that's pending before the Court.

22 Those are the three motions that are
23 pending before the Court. There is a hearing
24 scheduled before Judge Taylor. We're hopeful he will
25 address all three of those motions, at a minimum, the

1 motion to amend -- the motion to consolidate, your
2 Honor.

3 That's the current status of the State
4 Court action.

5 One of the reasons why we believe the
6 Court should take action today is because throughout
7 the period of time on the State Court action there
8 has been nothing but delay, delay, delay by the
9 borrower and the defendants on what are clear claims
10 as to liability under notes, and that the notes have
11 been in default for the last three years, one of
12 which is holding up the foreclosure of property. And
13 so we believe that those bases justify moving forward
14 now.

15 Your Honor, we could not -- we didn't have
16 standing to bring relief from stay on their behalf.
17 If their claims were so important, if they were in
18 such a hurry, they've had notice of this bankruptcy
19 case since June 6th and waited all the way until two
20 days before this hearing to bring their motion.

21 THE COURT: The cases were filed on June
22 20th --

23 MS. OLSEN: June --

24 THE COURT: -- is that correct?

25 MS. OLSEN: June. Okay. And they have

1 taken no action until two days before this hearing to
2 seek their own motion for relief from stay. And not
3 only have they sought that, but they've sought it on
4 the slow step process of having a preliminary hearing
5 first on a regular law motion date, which happens to
6 be the same time that we already have their 2004
7 scheduled for. And then we'll have to schedule final
8 hearing sometime later in the future.

9 So that's the status, your Honor. We
10 believe that the Court, because the stay does not
11 prohibit us from moving forward or act as a stay
12 automatically to protect non-debtor parties who are
13 co-obligors on debts, we should be allowed to move
14 forward.

15 THE COURT: All right. Well, let me --
16 let me ask you -- and I'll give Mr. Boley and Mr.
17 Berry a chance to respond as well -- if I were to
18 grant your motion and then subsequently grant Mr.
19 Shields' clients' motion, then he's pursuing all
20 counter parties and you're only going against those
21 other than the debtors?

22 MS. OLSEN: Correct, your Honor. Our
23 claims only implicate non-debtors.

24 THE COURT: Then would I expect you to
25 come back in here and say, "Now we want relief as to

1 VS Fox Ridge and the Christensens"?

2 MS. OLSEN: We have claims against VS Fox
3 Ridge and the Christensens, your Honor. We don't
4 believe it's necessary for us to get relief from stay
5 to pursue those claims either. We can deal with that
6 in the bankruptcy case by filing proofs of claim.

7 THE COURT: All right. Let me ask, Mr.
8 Kuhn, does the U.S. Trustee have a position on this
9 motion?

10 MR. KUHN: We do not, your Honor.

11 THE COURT: Thank you.

12 MR. KUHN: No opposition.

13 THE COURT: And no opposition to this
14 particular motion by either of the debtors; is that
15 correct?

16 MR. BOLEY: That's correct, your Honor.

17 I just want to make -- give the Court my
18 quick thought, which is I think this is a -- has a
19 simple answer, is the Court should clarify the
20 automatic stay does not apply to non-debtors. That
21 allows Forge to continue pursuing the TM parties, and
22 allows the TM parties to pursue their claims against
23 Forge if the State Court permits. And the debtors
24 don't need to be involved in any of that.

25 So I think that's the -- the simple

1 solution here.

2 THE COURT: All right. But the other shoe
3 has dropped now. You -- you know Mr. Shields has
4 filed his motion and that's going to require a
5 response by the debtors.

6 MR. BOLEY: And the debtors will oppose
7 that motion.

8 What -- essentially what that motion asks
9 -- and I haven't even -- I haven't read it, but I
10 understand it to say, based on third-party
11 conversations, is they want to bring a new lawsuit
12 that's never been previously filed against the
13 debtors in State Court. So they want relief from
14 stay to pursue a State Court complaint against the
15 debtors. And the debtors will oppose that.

16 We think if there are claims against the
17 debtors, they should be presented here. And claims
18 against the debtors should be resolved through the
19 Bankruptcy Court claims process, not through --
20 through State Court litigation. Otherwise, we would
21 have hundreds of State Court lawsuits to -- to deal
22 with. Every creditor would want to go to State Court
23 to liquidate their claims and prove their claims.
24 The debtors don't have enough money to defend them
25 all.

1 THE COURT: But that -- their assets --
2 their claims, asset claims, are tied up in those
3 lawsuits?

4 MR. BOLEY: The -- the debtors have
5 essentially two assets. One are claims against the
6 TM parties and against Mr. Howcroft. But those
7 aren't pending in the -- in this lawsuit. They're --
8 they're pending before other courts. And if I
9 understand the rulings in the State Court correctly,
10 absent a favorable appeal, the only claims the
11 debtors really have are now against Mr. Howcroft in
12 -- in front of Judge Toomey.

13 The debtors' other claims are their
14 ownership interests in the TM entities themselves.
15 That are -- they want to take -- they want to use the
16 very assets that the debtors have an interest in to
17 -- to litigate against the debtors.

18 And I'll just go back to my first
19 statement, which is, the simple thing is the Court
20 just clarify the automatic doesn't apply to
21 non-debtors. And we'll deal with this other motion
22 when it comes up. The debtors do intend to oppose
23 it.

24 THE COURT: All right. Your position is a
25 little bit contrary to the notice that Mr. Berry

1 filed in the State Court action.

2 MR. BOLEY: I will let Mr. Berry speak to
3 that notice. But I -- I wonder if there was a
4 confusion in his office because there's no co-debtor
5 stay in a Chapter 11 case.

6 THE COURT: Which is the first thing that
7 leapt out at me.

8 MR. BOLEY: Yeah. So I -- I'll let Mr.
9 Berry -- when I saw it, I -- my assumption was there
10 was just an error in his office and maybe a Chapter
11 13 form had been filed in -- as an oversight.

12 I'll let Mr. Berry address that.

13 MR. BERRY: Your Honor, in this --

14 THE COURT: Mr. Berry, what I'm referring
15 to specifically is your July 11th, 2012 filing in the
16 case before Judge Taylor in the Fourth District Court
17 for the State of Utah where you say, "Furthermore,
18 Stephen Christensen, pursuant to 11, U.S.C., Section
19 105, claim and invoke the co-debtor stay pending
20 confirmation of a Chapter 11 plan, as the entry of
21 judgment against any and all co-obligors would
22 interfere with and undermine the Chapter 11
23 reorganization of debtors, Stephen and Victoria
24 Christensen." And then you cite some cases.

25 MR. BERRY: We would withdraw the -- I

1 mean, we have said we have no objection in this case.
2 On further review, and admittedly that was very early
3 on in this case, and in particular, in reviewing the
4 documents attached by Forge in this case in their
5 pleadings, it becomes apparent that as to Forge's
6 motion, they are trying to liquidate claims which
7 need to be done -- needs to be done. And even more
8 importantly, to foreclose on properties, realize the
9 value of those properties, which would help liquidate
10 the remaining, if any, outstanding guarantee of the
11 debtors herein.

12 The property that they seek to liquidate
13 does not belong to either of the debtors before the
14 Court, and they make that point in their brief. And
15 as far as we can tell, it's absolutely true. We have
16 no quibble with that assertion. They have liquidated
17 one property, are seeking to liquidate additional
18 property, but none of that property actually belongs
19 to these two debtors. And so we actually now believe
20 that it is necessary to allow that liquidation to
21 occur because it would help resolve the amount of
22 remaining debt that would be due under the guarantee
23 of the debtors herein.

24 And so we actually view at this point,
25 after having reviewed pleadings, having reviewed the

1 documents, that it is actually necessary to allow
2 Forge to liquidate their claims.

3 THE COURT: All right. So you agree that
4 your statement in this July 11th filing before Judge
5 Taylor is not a correct statement of the law?

6 MR. BERRY: We would at this time, yes,
7 your Honor.

8 And I think the Court pretty much ruled on
9 that at the motion brought by Mr. Olson for Traverse
10 Mountain Enterprises when it entered its order two
11 days ago, I guess, the hearing of -- of a couple of
12 weeks ago. The order was entered on September 10th.
13 Pretty much overruling everything that had been
14 previously brought before the Court. And -- and
15 actually overruled the same arguments that -- that
16 the opposition here today is bringing again.

17 But, yes, we do not believe there is any
18 reason to stand in the way of Forge's motion as
19 before the Court.

20 THE COURT: Thank you.

21 Mr. Shields.

22 MR. SHIELDS: Thank you, your Honor.

23 Jeffrey L. Shields, on behalf of Ted Heaps
24 and there's multiple entities, I think, in our papers
25 we call the "TM defendants." I think there's nine

1 defendants there.

2 But let me just start with some of the
3 procedural issues which may resolve this.

4 We believe that the Forge motion is
5 defective. This is a jointly administered case.
6 Bankruptcy Rule 4000(a)(1) says that when there's no
7 unsecured, (inaudible) can be appointed, which is
8 there not in this case. You have to serve the motion
9 for relief from stay on the 20 largest creditors.

10 Now Forge, I don't know if it was by design or
11 mistake, but they only served the creditors in one of
12 -- one of the two jointly administered cases. And
13 Ms. Olsen discounts the fact that -- let me tell you
14 the parties who have not received notice. These are
15 -- these are the -- on the list of the 20 largest
16 creditors in the Stephen and Victoria Ann Christensen
17 case: America First Credit Union, America Express.
18 Diane Lefrandt, Intermountain Healthcare -- they're
19 listed three different times with a few different
20 claims, but different addresses, some of them are
21 different, some are the same -- the Internal Revenue
22 Service, Traverse Mountain Enterprises, Utah State
23 Tax Commission, Wells Fargo Bank. So there's one,
24 two, three, four, five, six, seven, eight, nine, ten
25 creditors who have not received notice of Forge's

1 motion.

2 We would have raised this in our
3 opposition, but I didn't catch it until two days ago
4 when we were filing our motion. My staff said, "Who
5 should we send this to?"

6 And I said, "Well, just use the same one
7 Forge did." And then I looked. I said, "No. No.
8 This is way incomplete." And I -- I notified Forge's
9 counsel last night that we noted this error.

10 And I think for that reason alone this
11 Court should continue the hearing on Forge's motion,
12 have it held the same date as ours.

13 But substantively -- I don't want to -- I
14 don't want to rely on procedure here, your Honor. I
15 want to go to the substance.

16 Mr. Boley pretends that it's only Mr.
17 Berry who has taken the position that the stay
18 applies to non-debtors. And that is not true. I've
19 got -- I know there's a lot of facts in this case.
20 And I don't want to bore the Court. If I'm getting
21 too factual, you cut me off. But there is -- there
22 are three cases involved here. There's a case before
23 Judge Toomey in Salt Lake, Third District Court.
24 That case is critical because that's where some
25 evidence has been discovered about the conspiracy

1 between the movants today and the debtors. That
2 evidence is subject to a protective order. One of
3 the hearings that was set to go forth just the day or
4 two after the bankruptcy petition was filed was the
5 motion to amend that protective order to allow my
6 clients to use that evidence in the cases in which
7 Forge is the plaintiff. And the debtors took a very
8 strong position, both Mr. Berry and Mr. Boley, that
9 that matter is stayed. I'll -- I'll quote to the
10 Court -- and again, I don't want to waste your time.
11 If this is too much, you cut me off. But let me have
12 the Court look to Docket Number 67.3. It's in our
13 papers attached to Exhibit C. And that is the
14 pleading that my clients filed in State Court to
15 bring this matter before your Honor. You'll recall
16 Forge's position was that the stay didn't apply, they
17 could just plow ahead against non-debtors. And both
18 Judge Taylor and Judge Laycock have issued orders,
19 which we've attached to our papers, saying, "No.
20 That is not the case. We need to get relief from
21 stay before we can proceed in this case." Because
22 this is a complicated matter with lots of parties and
23 they just didn't want to waste time on getting
24 halfway through the case and say, "Oh, someone
25 violated the stay."

1 But if you'll look at the 67-3, page 13 of
2 38, that is the exhibit to our papers. And it's a
3 notice of bankruptcy, filed by Mr. Berry in the --
4 this case. And in the last paragraph of that
5 statement he said -- this is independent of this 105
6 co-debtor stay. He says, "Please be advised that the
7 commencement and continuation of the above-entitled
8 actions, to the extent they seek relief against the
9 debtor, in violation of 362, failure to abide by the
10 foregoing provisions will be deemed a willful
11 violation of the United States Bankruptcy Code, which
12 will be brought to the attention of the United States
13 Bankruptcy Court for appropriate sanctions."

14 Now you have to go to the next couple of
15 pleadings. There's some e-mail exchanges that say
16 his position is, if you do anything against
17 non-debtors that affects the debtors, then,
18 therefore, you're violating the stay against the
19 debtor.

20 I would refer your Honor next to the
21 e-mail. It's page 18 of 38 of Exhibit C of the
22 pleading we filed, Document 67-3. This is an e-mail
23 from LeVar Christensen to Sammi Anderson, who was
24 counsel for my clients in the Judge Toomey case that
25 had the motion for the protective order scheduled in

1 the next several days. And he says in there that the
2 "stay should continue to the July 5th hearing."

3 And -- and Sammi Anderson had written to
4 him and says -- this is on the middle of that page --
5 "Although proceedings against those parties are
6 stayed pursuant to the automatic stay, at least for
7 the time being, it seems we should still go forward
8 on the attorney's fees motion as against McKay
9 Christensen and Chris Christensen, non-debtors, as
10 well as SJ Fox Ridge, also a non-debtor. At a
11 minimum we should be able to get the protective order
12 issues resolved."

13 And LeVar writes back. He says, "No. The
14 stay applies to all those non-debtors."

15 My page 23 of 38, on that same document,
16 67-3, is a pleading filed by Mr. Boley in the Judge
17 Toomey case. He didn't just file in Bankruptcy, he
18 filed a pleading in that case on behalf of the
19 debtors. And in the middle of page 2 of that
20 pleading, which is page 24 of 38 he says, quote, "In
21 short, all proceedings in the above-captioned lawsuit
22 involving VS Fox Ridge and/or Stephen and Victoria
23 Christensen are statutorily enjoined and
24 automatically stayed." And then he cites cases
25 saying that if you violate this, you're going to be

1 in violation of the court orders and -- and be
2 sanctioned.

3 Then further on down that page he has in
4 all caps and bolded, "The above-captioned Court
5 should not make or enter any rulings, findings,
6 orders, judgments, et cetera, against the debtors or
7 that might prejudice the debtors under the doctrines
8 of claim preclusion or issue preclusion."

9 So Mr. Boley himself is stating, "If you
10 proceed with this litigation, Judge Toomey, even the
11 minor issue of getting a protective order amended,
12 that could be claim -- claim preclusion or issue
13 preclusion. I'm citing the automatic stay as cause
14 to stop that hearing."

15 THE COURT: Okay. These cases were filed
16 on June 20th.

17 MR. SHIELDS: July 2nd, actually.

18 THE COURT: No --

19 MR. SHIELDS: Oh -- oh, excuse me. The
20 petitions were filed?

21 THE COURT: Yes.

22 MR. SHIELDS: Yeah. Yeah.

23 THE COURT: Right.

24 MR. SHIELDS: Yeah. Excuse me. This
25 pleading was filed July -- you're right. The

1 petitions I think were June 20th.

2 THE COURT: All right. And --

3 MR. SHIELDS: So --

4 THE COURT: -- you -- your clients didn't
5 move for relief until the last 48 hours?

6 MR. SHIELDS: That's correct.

7 THE COURT: Why?

8 MR. SHIELDS: Because we wanted to see
9 what the debtor was going to do. As you know, the
10 debtor took the position I need the stay as a
11 breathing spell to determine what I'm going to do in
12 the future of this case. When we had the status
13 conference before I stood up and said, "I don't know
14 if this is a real reorganization or just a litigation
15 tactic." But we wanted to see what the debtor was
16 going to do. We would have loved to get on with that
17 litigation, particularly the motion to amend the
18 protective order.

19 And I'm not through yet on quoting the --
20 the -- maybe I'm boring you, but --

21 THE COURT: You're not boring me. I've
22 read the materials.

23 MR. SHIELDS: Okay. That's why. We were
24 waiting to see what the debtor was going to do.

25 The -- that same pleading, on page 3,

1 again, the bold, caps says, "Please take further
2 notice" in bold cap, then it goes to normal type --
3 "any person who violates the automatic stay may be
4 held liable for actual damage, including costs,
5 attorney's fees, and in appropriate circumstances,
6 punitive damage and exemplary damage."

7 So that's the pleading that my client was
8 faced with should we proceed with this litigation.

9 So what happened is counsel for my clients
10 wrote a letter -- or actually, there is one more
11 pleading -- or one more e-mail that relates to that.
12 This is page 33 of 38, Document 67-3. This is an
13 e-mail from Mr. Boley to Mr. Preston, who is counsel
14 for my clients in the Fourth District Court that's
15 referred to as the -- the Forge litigation. I'm
16 quoting from page 1 of that e-mail, the fourth
17 paragraph. "Among other reasons, your clients have
18 made serious allegations against VS Fox Ridge, LLC
19 and Stephen Christensen, collectively the debtors,
20 including that both debtors are part of a RICO
21 combination or conspiracy."

22 And then the next paragraph, "In contrast
23 to the rulings you cite, the most recent controlling
24 decision on the scope of the automatic stay espouses
25 a much more expansive view."

1 And so they would not even let us proceed
2 with the deposition of McKay Christensen, who again
3 is a non-debtor, totally contrary to -- to the
4 position the debtor is now take.

5 Page 37 of 38, Exhibit C, Document sixty
6 -- or yeah, Docket Number 67-3. Another e-mail.
7 This is from Stan Preston to LeVar, counsel for the
8 debtors in that litigation. Quote, "In accordance
9 with your position, you have informed me that you
10 intend to instruct McKay Christensen not to answer
11 any questions. You've also indicated to me that
12 based upon your review of the documents your client
13 has gathered in response to the subpoenas, you
14 believe the production of documents would be subject
15 to the same limitations regarding the current scope
16 of the case, with the additional concern that most of
17 the documents are subject to a protective order in
18 the case before -- pending before Judge Toomey."

19 And so on the next page Mr. Christensen
20 writes back -- or actually, this was the predecessor
21 e-mail, but it lays out his -- his theories. "The
22 issues and defenses are so integrated, and Stephen
23 Christensen has been in such a superior position to
24 know the facts and issues involved in this case that
25 McKay's focus, as reflected on your document request

1 is" -- excuse me -- "that McKay's role is extremely
2 limited and directly affected by the Chapter 11
3 filing."

4 So they are taking the position that even
5 going as to document production as to a non-debtor is
6 in violation of the stay.

7 And then the Court has already noted that
8 pleading on -- it's Document 67-4 to my papers, where
9 Mr. Berry, after all that other interchange, then
10 throws in, "Oh, by the way, this is a co-debtor
11 stay." Which he's now withdrawn, but he didn't
12 withdrawn until today. It was not an issue before
13 the hearing in the other case, I don't believe. That
14 was not an issue at all between the Howcroft case.

15 So three months later, after all these
16 depositions and these protective order motions have
17 been continued -- and the -- the protective order
18 motion is crucial to my clients. We have a -- a
19 defense and a counterclaim of conspiracy between the
20 debtors and Forge. And a lot of that documents is in
21 the Judge Toomey case. You might be aware of that
22 case. That case was started by the debtors for
23 violation of a settlement agreement that was entered
24 between my clients and the debtors years ago. The
25 debtors started that case three years ago. There's

1 been lots of trial motions. My clients have won the
2 claims the debtors brought on summary judgment. The
3 only thing that remains in that case is our claims
4 against them and the claim that Mr. Erik Olson's
5 client brought before your Honor two or three weeks
6 ago. But the crucial part -- the reason we want
7 relief from stay of that is that we need to get the
8 documents from that case to use in our defense in the
9 Forge case. And to grant the Forge motion only,
10 meaning, they can go litigate against us, we can't
11 get relief from stay to go get the documents needed
12 to defend ourselves, is patently unfair and
13 prejudicial to my client.

14 Let me just close with a couple other
15 quotes here.

16 You'll recall that the debtor did file a
17 response to this motion, and it is Docket Number 64,
18 in which contrary to all those e-mails and those
19 prior notices I take you, now the debtor is saying,
20 on the bottom of page 1 of Docket 64, "The debtors
21 agree that the statutory injunction under Section
22 362(a) of Title 11 of the United States Code does not
23 extend to and does not enjoin continuation of
24 proceedings against non-debtor."

25 Now that's -- that's just patently

1 inconsistent with the position they've taken with my
2 client for the past three months.

3 Finally, the last statement on that same
4 pleading, document -- Docket 64, "Such order may be
5 entered without the debtors' review, endorsement,
6 approval or opportunity to object."

7 Again, I just think this is evidentiary of
8 the conspiracy between Forge and my clients. They're
9 working with Forge to have the stay lifted so they
10 can litigate with me, but they get the benefit of the
11 stay, including the not letting us have documents
12 that we need in the Judge Toomey protective order
13 case.

14 My clients are not unwilling to proceed to
15 litigation. In fact, I had to call my clients off.
16 When I got involved right at the bankruptcy filing,
17 State counsel, in both the Judge Toomey litigation
18 and the Forge litigation, desperately wanted to
19 proceed. And I'm the one -- I have more bankruptcy
20 expertise. That's why I was brought on. I says, "I
21 think the safe thing to do is take the position --
22 because the debtor is taking that position -- that --
23 whether the stay applies or not" -- I've never taken
24 the position that the stay applies. Even in our
25 pleadings I've filed before your Honor we said,

1 "We're not taking the position." I know the debtor
2 took the position. Now they've retreated from that
3 position. I said, "The best thing to do is go get
4 relief from stay and get it clarified."

5 Ultimately, both Judge Taylor and Judge
6 Laycock agreed. And they have orders attached to the
7 pleading I filed a couple days ago. I don't know if
8 your Honor's had to look at those. But there's
9 written orders from both those judges. And they say,
10 "It is absurd to proceed on this case until we get
11 relief from stay of all of the parties, including the
12 debtors." There's property involved in which the
13 debtors have guaranteed. My clients have guaranteed
14 the debt. Because it's a real property issue, you've
15 got to get the foreclosure done. Then you've got to
16 determine the deficiency issues. And you also have
17 to determine our counterclaim, which is part of our
18 defense.

19 So they -- they expressly said -- if you
20 look at Judge Taylor he said, "These cases are too"
21 -- he -- he calls the debtors an "indispensable
22 party" under Rule 19. You know, you've got to have
23 that party there before you can proceed. Even if you
24 were to grant the relief that Forge asks without
25 considering ours, I think Judge Taylor's going to

1 say, and we're going to argue, "You can't proceed
2 without the debtors. We've got to have the debtors'
3 relief."

4 Now we have asked for that relief. We
5 recognize that our motion has been filed not
6 sufficiently prior to this hearing that people should
7 be bound by this. But if Forge is genuine about
8 getting on with that, they ought to agree to our
9 motion and let's go forward. But I -- I hear from
10 the debtor today that they're going to oppose that
11 motion, which is odd, when they've taken the position
12 now that the stay doesn't apply to Forge but it
13 should apply to my clients.

14 Let me -- and let me conclude with the
15 following: In response to arguments by counsel there
16 -- Ms. Olsen said there's only two actions. There's
17 actually three. I mentioned that Toomey action.
18 That's very critical. We have asked the Court, lift
19 the stay to let us get on with that Toomey action.

20 Can't read my own writing. I'm sorry,
21 your Honor. I'll move on.

22 We didn't -- we did not schedule this
23 motion on any type of slow track. We did what you
24 have to do. I think you schedule a preliminary
25 hearing. There's no opposition. We can have that

1 relief without opposition. We'd submit an order as
2 promptly as we could to get this order lifted -- I
3 mean, to get the stay lifted to proceed with the
4 litigation.

5 THE COURT: Well, I can fix that easy
6 enough.

7 MR. SHIELDS: Yeah. Mr. Berry -- or
8 excuse me. I guess it's Mr. Boley said that he
9 hasn't read our motion, but he's been told that we
10 want to initiate new litigation. That's absurd.
11 We're not asking for any new litigation. We've got
12 more litigation with this debtor than we know what to
13 do with. We just want relief from stay to proceed
14 with the litigation that's already filed. And I
15 would suggest that not reading a motion, then
16 representing what it says is not an appropriate
17 argument before this Court. And it certainly
18 mischaracterizes my client's position.

19 THE COURT: I didn't -- well, I -- I
20 certainly didn't see in your motion a request to
21 commence a new action.

22 Was there a request in there to file any
23 additional claims against the Christensens or VS Fox
24 Ridge?

25 MR. SHIELDS: No. I think the claims are

1 all out there. I think we need relief from the stay
2 so that we can -- let's see. If -- if we get our
3 motion to amend the counterclaim, then Christensens
4 could be a defendant in that one, the counterclaim
5 for conspiracy, because they're one of the
6 contractors.

7 MR. BOLEY: Your Honor, that's not the way
8 the pleading's written right now.

9 MR. SHIELDS: Well --

10 MR. BOLEY: It's only against Forge.
11 And -- and I've just recalled, it wasn't
12 -- it was what I read in the TM parties' response
13 that perked my memory, what they said they
14 anticipated filing the motion for. So I apologize.

15 MR. SHIELDS: Our motion is for relief
16 from stay as to the debtors in all pending
17 litigation. And similar to the motion you granted as
18 to Erik Olson and -- and his client, was not to
19 litigate and get a judgment and start enforcing the
20 judgment, to litigate, get a liquidation of the
21 claims and bring them back to your Honor. These
22 claims have to be liquidated. And I'm not here to
23 argue the merits of our motion. I -- I'll argue that
24 at -- on October 10th if we need to.

25 But we believe when you -- when you look

1 at our motion and consider the merits of it, it
2 clearly should be granted and it should be granted as
3 to the debtors and it should be granted as to
4 non-debtors. So we don't want to have any games
5 with, oh, it may effect me, it may be claim
6 preclusion or issue preclusion. We need full
7 litigation. What we don't need is litigation with
8 one arm tied behind our back where we can't use
9 documents or make arguments that need to be made in
10 the conspiracy case.

11 Unless your Honor has any questions,
12 that's all I have.

13 THE COURT: All right. There is, based
14 upon the admission of Counsel, a small procedural
15 issue with the relief that's been requested as to the
16 Christensens. What I'm going to do is continue this
17 hearing in conjunction with a final, not a
18 preliminary, hearing on the motion made by Mr.
19 Shields' clients.

20 And -- and Ms. Olsen, Mr. Harrington, I
21 apologize for slowing you up a little bit in State
22 Court, but I -- I think we should get this resolved
23 -- these two matters resolved together so that the
24 parties can proceed unfettered to liquidate all the
25 claims, if that's my decision on the motion made by

1 Mr. Shields' client.

2 So what I'm going to do is set it for an
3 evidentiary hearing -- although, preliminarily, I
4 don't see why, Ms. Olsen, your clients need an order,
5 except for the fact that both of the debtors have
6 muddied the waters in the State Court litigation with
7 the filings they made. So I'm going to continue this
8 to 9:00 a.m. on Thursday, October 11th and allow you
9 to provide notice to the parties that haven't
10 received notice yet, Ms. Olsen.

11 It's my intent that if there's no
12 substantive material objection by any of those
13 parties to grant the relief you've requested and to
14 make it affirmative relief so that none of the State
15 Court judges are -- have any concerns about what they
16 can and can't do. So it'll probably be an
17 affirmative relief from stay.

18 MS. OLSEN: Okay.

19 THE COURT: So I don't think you have to
20 get ready for any evidence, other than if you want to
21 oppose anything that Mr. Shields is going to throw
22 out there.

23 Mr. Shields, so we'll strike the
24 preliminary hearing on October 10th. We'll just go
25 to trial on this on the 11th, at 9:00 a.m.

1 MR. SHIELDS: Perfect.

2 THE COURT: What I'd like you to do is
3 work -- since the debtors have indicated they're
4 going to oppose it, I'll want to -- want you to work
5 with them to come up with some schedule for exchange
6 of the same information you'd be required to exchange
7 under Rule 26 within ten days. No. That's not going
8 to work. That's a Sunday. So by Monday, September
9 24th.

10 MR. SHIELDS: Okay.

11 THE COURT: -- notify each other who your
12 witnesses are, what your documents are going to be.
13 And then provide an original set of exhibits and two
14 sets of copies -- anybody who's going to submit
15 exhibits -- by Tuesday, the 9th of October, so that I
16 have a chance to review those before the hearing.

17 MR. SHIELDS: Thank you.

18 THE COURT: And the debtors' actual
19 response is due on October 1st, but you're going to
20 need to accelerate the preparation for the hearing
21 before that. So I won't change the deadline for any
22 written opposition to the motion, but you're going to
23 need to start to get together your witnesses and
24 exhibits before that.

25 MR. SHIELDS: I think the exchange --

1 subject to their written -- I think we know the
2 issues, but if they file something in their written
3 objection that we hadn't anticipated, I think we can
4 amend at that time. I don't think it'll be
5 substantive, but --

6 THE COURT: Well, that'll give you over a
7 week ahead of time, yeah.

8 So the minute entry on this discrete
9 matter will simply reflect that the matter's
10 continued to October 11th. And again, it's my
11 intention to grant the relief requested at that time,
12 subject to any objections based upon the parties who
13 haven't received notice yet.

14 MS. OLSEN: Thank you, your Honor.

15 MR. BERRY: Your Honor, if I understand
16 that, then the objection before the Court today,
17 brought by Mr. Shields, is overruled?

18 THE COURT: All he was saying was I want
19 to have -- I want to have you hear my matter first.
20 And by my scheduling of the matters, I'm addressing
21 that. So there's nothing to overrule.

22 MR. BERRY: Would there be anything wrong
23 with --

24 THE COURT: There will be no order entered
25 at this time.

1 The other thing on the calendar was the
2 continued status conference. The debtors filed about
3 -- sometime within the last two hours -- a report
4 indicating that they -- as I read it, they think they
5 can have a plan filed within 30 days?

6 MR. BERRY: Yes, your Honor.

7 THE COURT: All right. I appreciate the
8 information in the status report.

9 I'm going to continue the status
10 conference. Again, how about November 6th at 10:00
11 a.m., that's a Tuesday. And we'll be beyond the
12 point at which I directed the debtors to file their
13 tax returns at that point. And we'll be beyond the
14 deadline that the debtors have offered to file a Plan
15 and Disclosure Statement. And so I think that would
16 be a good time to take another look at the case.

17 MR. BERRY: Yes, your Honor.

18 THE COURT: All right. So the status
19 conference will be continued to November 6th at 10:00
20 a.m.

21 Any other -- anything else you want to add
22 to that, Mr. Kuhn?

23 MR. KUHN: Your Honor, the monthly
24 financials were delinquent. They have -- were also
25 filed. We do have an issue with -- there's a check

1 box -- maybe I'm misunderstanding, and I've talked to
2 Mr. Boley about that -- about waiver of a balance
3 sheet. We didn't intend to waive any requirement for
4 a balance sheet. So we're going to be asking him to
5 amend and provide balance sheets in the monthly
6 financial reports.

7 And that's the primary clarification.

8 THE COURT: All right. Well, we'll make a
9 note of that and we'll check that again on November
10 6th.

11 All right. Thank you.

12 THE CLERK: All rise.

13 (Court adjourned at 2:39 p.m.)

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REPORTER'S CERTIFICATE

3

4 STATE OF UTAH)
5 COUNTY OF SALT LAKE) ss.
6

7 I, Kelly Fine-Jensen, Registered
Professional Reporter and Notary Public in and for
the State of Utah, do hereby certify:

8

9 That on September 14, 2012, I transcribed
an audio file at the request of Holland & Hart, LLP;

10

11 That the testimony of all speakers was
12 reported by me in stenotype and thereafter
transcribed, and that a full, true, and correct
transcription of said testimony is set forth in the
preceding pages, according to my ability to hear and
understand the audio file provided;

13

14 That the original transcript was sealed
and delivered to the Bankruptcy Court for
safekeeping.

15

16 I further certify that I am not kin or
otherwise associated with any of the parties to said
cause of action and that I am not interested in the
outcome thereof.

17

18 WITNESS MY HAND AND OFFICIAL SEAL this
17th day of September, 2012.

19

20

21

22



KELLY FINE-JENSEN
NOTARY PUBLIC - STATE OF UTAH
My Comm. Exp. 08/06/2014
Commission # 600115

Kelly Fine-Jensen
KELLY FINE-JENSEN, RPR
Notary Public
Residing in Salt Lake County

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